Supreme Court, U.S.
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No. 92-1156

In The

Supreme Court of the United States

October Term, 1992

GEORGE HURST, RON MAYS, HENRY JACKSON
JOHN MOORE, CHESTER DAVIS,

Petitioners,

vs.

MARILYN WILSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LARRY R. DAVES
LARRY R. DAVES & ASSOCIATES
405 W. Magnolia Ave.
San Antonio, TX 78212
(210) 733-3299

Attorney for Respondent

Dated: March 5, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent does not believe that this case presents either of the Questions set forth in Petitioners' Application for Writ of Certiorari and that those questions cannot be decided on this record.

Respondent restates the questions presented as follows:

1. The Question Of Whether The First Amendment Protects Informal Complaints Of Sexual Harassment Is Not Presented By The Opinion Below Or By The Record.

2. The Decision That The Speech In Question Is Protected Does Not Conflict With An Opinion From This Court Or From Any Other Circuit.

PARTIES TO THE PROCEEDING

1. George Hurst, Ron Mays, Henry Jackson, John Moore, Chester Davis, Petitioners.

2. The University of Texas Health Center at Tyler was a Defendant below for purposes of Respondent Wilson's Title VII claim, which was dismissed.

3. Marilynn Wilson, Respondent.

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STATEMENT

Petitioners have overstated the facts in its favor. The Court of Appeals as well as this Court must view the facts in the light most favorable to the non-moving party in reviewing the propriety of granting a motion for directed verdict. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Petitioners have stated the facts in a light most favorable to the movant rather than the non-movant.

The allegations of sexual harassment made by Wilson were made in a formal charge of discrimination. (R. III-12, 13) Before Wilson brought the complaints to the Police Chief she contacted the Director of Human Resources who advised her to first inform the Police Chief before filing formal charges. (R. II-23, 29)

Wilson complained that a campus police officer, Chester Davis, sexually harassed her and three other women employees of the University. (R. III-12) Davis admitted asking several young women employees to go to the woods with him and was disciplined following an investigation. (R. III-146, PX-18)

Wilson, after reporting her complaints, was reprimanded by the Chief of Police, purportedly for her delay in reporting the incident. In the letter of reprimand the Chief of Police stated:

> "You cannot unclothe yourself of duty at your convenience. In this matter, you undressed yourself of responsibility both mentally and administratively by alleging intimidation and by waiting twenty-eight days before taking any action and/or reporting the incident to me."

Thereafter, acting on the Chief's request to report even rumors of misconduct, Wilson submitted a report of what she believed to be unwelcomed comments by another officer to a young woman. (R. II-36, 37) The young woman apparently welcomed the comments, so the Police Chief suspended Wilson for ten days for allegedly filing a false report and demoted her from Sergeant to Police Officer. During the appeal of the demotion Wilson was terminated after being accused of forging a document.

The opinion of the Court of Appeals accurately summarizes the evidence except for failing to note that Wilson filed formal charges of discrimination and that Plaintiff raised her complaints with the Police Chief at the request of the personnel director.

Respondent filed suit against Petitioners, alleging both discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, discharge for having exercised her First Amendment right to report sexual harassment, and defamation because she had been falsely accused of being a forger and a liar. The Title VII claims were tried to the bench, and the First Amendment and defamation claims to a jury. The district court ruled against Respondent on her Title VII claims, and directed a verdict in favor of Petitioners on the First Amendment and defamation claims.

On appeal, Respondent argued there was enough evidence of retaliation for the reports of sexual harassment to take the case to the jury. Petitioners disputed that contention, but also argued that, even if there was enough evidence of retaliatory motive to reach the jury, the directed verdict could be affirmed on the alternate ground that those reports didn't qualify as "of public concern" under *Connick v. Myers*, 461 U.S. 138 (1983). This argument was not based on a broad contention that reports of sexual harassment are not matters of public concern; rather, Petitioners relied solely on a Fifth Circuit case that had distinguished between reports made in one's capacity as a citizen. *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986). According to Petitioners, *Terrell* drew a bright line between these two

capacities; Petitioners contended that because Respondent had a duty as a police officer to report these infractions, her reports were necessarily made solely in her capacity as an employee. Petitioners also argued for immunity from damages, essentially on ground that, because Petitioners were allegedly right on their *Connick* argument, they were necessarily qualifiedly immune.

The Court of Appeals determined that there was enough evidence of defamation and of retaliatory motive to send the First Amendment and defamation claims to the jury. It also rejected both alternate grounds for affirmance of the directed verdict on the First Amendment. First, the court held, the fact that speech may be made, in part, in one's capacity as an employee does not prevent it from also pertaining to matters of public concern, thus implicating the First Amendment. Moreover, the court held that workplace sexual harassment is the focus of such prominent public concern that retaliation for reporting it would violate a clearly established right. Accordingly, the court remanded to permit a jury to decide whether Respondent suffered such retaliation.

REASONS FOR DENYING THE WRIT

There Is No Disagreement Among The Lower Courts On Either Of The Questions On Which Review Is Sought, And The Second Question Was Not Argued Below.

1. The first question on which Petitioners seek review is whether, when Respondent was fired (in 1987, although the Question says 1986), it was clear that workplace sexual harassment was a matter of great public

concern such that an employee's report of such harassment was protected by the First Amendment. Petitioner does not identify a single decision by any lower court that reached a different result from the holding below on the issue of immunity. Instead, in order to try to manufacture a split among the circuits, Petitioner argues that immunity must always be discussed at great length, as the Tenth Circuit did in the case they found; the Fifth Circuit's discussion, being too short, raises a conflict on how long such discussions ought to be.

Not only is this a preposterous position, but it is flatly contradicted by Petitioner's own arguments in the court of appeals. In their brief, Respondents spent only three paragraphs, barely more than a full page of text, 22-23, asserting their immunity against the First Amendment claims. In that argument, they said little more than that, because the law was still clear that speech made as an employee, rather than as a citizen, and in the course of making police reports, as that is never protected by the First Amendment, *a fortiori* Petitioners had qualified immunity. They also argued that, because *Pickering v. Bd. of Education*, 391 U.S. 563 (1968), balancing must be performed on a case by case basis, a public official cannot be held liable in damages for balancing incorrectly. Not only is that not the law, but it isn't the basis for qualified immunity that Petitioners now advance in this Court through their question presented. Thus, this question also does not merit review.

In any event, *Givham v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) and *Connick v. Myers*, 461 U.S. 138, 147-148, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) made clear, long before

the discharge here, that Respondent's rights were protected.

2. The second question on which review is sought is whether reports of sexual harassment are *per se* matters of public concern. Petitioners did not present that issue below. Their only argument in that regard was that Respondent had made reports that, as a law enforcement officer, she had a duty to make; Petitioners then argued that the Fifth Circuit's decision in *Terrell* was controlling. Although the Fifth Circuit rejected Petitioners' *Terrell* argument (correctly, in our view), that is not the question on which they ask this Court to grant review.

Nor is there any division among the lower courts on the question that Petitioners do present. In *Callaway v. Haferman*, 883 F.2d 842 (7th Cir. 1989), the court did not say that sexual harassment reports cannot be protected, and did not even address the question of whether they are usually protected. The court simply held that, in the unusual circumstance where the Respondent not only made the report only about herself, and made it privately, but also went to great lengths to avoid the issue becoming public, wanting to keep it personal and private, the court could not say that the case involved the sort of "matter of public concern" that is protected under *Connick*.

The Decision Below Accords With The Opinions Of The Courts Of Appeal And There Are No Broad Conflicts Among The Lower Courts Requiring Resolution By This Court.

Petitioners, based upon their version of the record, assert that the decision of the Court of Appeals is in

conflict with *Callaway v. Haferman*, 883 F.2d 842 (7th Cir. 1989), thus generating a conflict among the Circuits.

The decisions are not in conflict. The Court in *Callaway* did not reach the broad question which Petitioner asserts in the Petition. In *Callaway, supra* the Seventh Circuit was faced with the question of whether informal oral communication of alleged sexual harassment is protected. Callaway did not want to make a public issue of the allegations.

Wilson, on the other hand, first reported her complaints of sexual harassment to the personnel director who was charged with the responsibility of receiving such complaints under the University's policy prohibiting sexual harassment. At the direction of the personnel director, Wilson reported to the Police Chief the sexual harassment of herself and three other women employees. She then filed formal charges of sexual discrimination with the University and after her discharge filed charges with the Equal Employment Opportunity Commission.

The *Wilson* holding, then, can be distinguished from *Callaway* on the facts. Wilson's speech involved matters of both personal and public concern. The speech was encouraged by and supposedly protected by both the internal policy prohibiting retaliation and by Title VII's proscription of reprisals. Wilson complained not only of her own sexual harassment but also of the harassment of other women by the same actor. Respondent, by filing formal internal charges of discrimination and by complaining about the sexual harassment of other women on the campus, engaged in speech on a matter inherently of

public concern. The Court of Appeals below, then, correctly concluded, based upon the content, form and context, that the speech was protected. Whether the speech involves a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. *Connick v. Myers*, 461 U.S. 138, 147-148, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). See also, *Givham v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). This inquiry is necessarily *ad hoc* and fact-intensive. Therefore, based upon the facts herein, the decision of the court below is not in conflict with prior precedent. *Wulf v. City of Wichita*, 883 F.2d 8412 (10th Cir. 1989) in Respondent's view correctly states the law.

CONCLUSION

Therefore Respondent prays for the reasons stated that the Petition for Writ of Certiorari, be DENIED.

Respectfully submitted,

LARRY R. DAVES & ASSOCIATES
405 W. Magnolia Ave.
San Antonio, TX 78212
(210) 733-3299

LARRY R. DAVES
Attorney for Respondent